

## Regulation A and the Integration Doctrine: The New Safe Harbor

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### I. INTRODUCTION

Critics have long charged that the Securities Act of 1933<sup>1</sup> (Act) and the Securities and Exchange Commission (SEC), which administers the Act, are insensitive to the capital formation needs of small businesses.<sup>2</sup> The Act's regulatory regime, it has been argued, is too rigid and expensive and discourages or precludes small businesses from selling securities.<sup>3</sup> In 1992, in reaction to such criticism, the SEC proposed a variety of rule changes<sup>4</sup> designed "to facilitate capital raising by small businesses and reduce the compliance burdens placed on these companies by the federal securities laws."<sup>5</sup> Among these "small business initiatives," adopted in the summer of 1992,<sup>6</sup> was a little-noticed, virtually undiscussed new rule—Rule 251(c)—protecting Regulation A offerings of securities from integration with other offerings. That expansive yet enigmatic integration safe harbor is the focus of this Article.

Unfortunately, the new Rule 251(c) integration safe harbor can be understood only in the context of the Securities Act's registration requirements and the statutory and regulatory exemptions from those requirements. I briefly discuss those registration requirements and exemptions, especially the

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<sup>1</sup> 15 U.S.C. §§ 77a-77aa (1988 & Supp. IV 1992).

<sup>2</sup> See *infra* notes 21-25 and accompanying text.

<sup>3</sup> See *infra* notes 21-25 and accompanying text.

<sup>4</sup> Securities Act Release No. 6924, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,931 (Mar. 11, 1992) [hereinafter *Proposing Release*].

<sup>5</sup> *Id.* at 82,481.

<sup>6</sup> The proposed revisions were adopted, with some modifications, on July 30, 1992. They became effective on August 13, 1992. Securities Act Release No. 6949, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,439 (July 30, 1992) [hereinafter *Adopting Release*].

Regulation A exemption, in Part I.A.<sup>7</sup> In Part I.B, I introduce the integration doctrine and the problem it attempts to solve—how to identify discrete transactions for the purpose of applying transaction exemptions from the Act's registration requirements. The remainder of the Article is an in-depth analysis of the new Rule 251(c) integration safe harbor.

### A. *The Registration Requirement for Offerings of Securities and Exemptions from that Requirement*

Businesses raising capital in the United States through the sale of securities must contend with the Securities Act of 1933. The Securities Act requires companies offering securities for sale first to file a registration statement with the SEC containing detailed information concerning the company, its business, its finances, and the contemplated offering.<sup>8</sup> Sales of the company's securities can be finalized only after that registration statement survives the sometimes-lengthy SEC review process and becomes effective.<sup>9</sup> In addition, the selling company must furnish investors a prospectus, which contains much of the information in the registration statement.<sup>10</sup>

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<sup>7</sup> Readers familiar with the registration requirements of the Securities Act and the associated exemptions may safely skip to Part I.B.

<sup>8</sup> Section 5(c) of the Securities Act of 1933 makes it unlawful

to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .

15 U.S.C. § 77e(c) (1988). All of the subsections of § 5 have similar interstate commerce requirements. To simplify the subsequent discussion, I shall assume that this interstate commerce requirement is met.

The structure of the Securities Act, particularly § 5, is too complicated for detailed treatment in this Article. For a relatively brief, easily accessible discussion of the registration process and the federal regulation of securities offerings, see MARC STEINBERG, *UNDERSTANDING SECURITIES LAW* 55–80 (1989). See also 1 THOMAS L. HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* 56–125 (1990).

For a detailed discussion of the contents of the registration statement and prospectus, see 2 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 599–742 (3d ed. 1989). See also 1 HAZEN, *supra*, at 94–103.

<sup>9</sup> Unless a registration statement is in effect as to a security, § 5(a) of the Securities Act makes it unlawful:

- (1) to make use of any means or instruments of transportation or

Preparation of the required disclosure documents is expensive<sup>11</sup> and the delay before the company can actually sell the securities is often considerable.<sup>12</sup> The rationale for imposing such costs on business is to protect securities investors through more complete and more accurate disclosure.<sup>13</sup> However, for many offerings, particularly smaller offerings, the benefit may not justify the

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communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. § 77e(a) (1988).

<sup>10</sup> Until the registration statement becomes effective, the Securities Act restricts written communications with prospective purchasers. Section 5(b)(1) of the Act, 15 U.S.C. § 77e(b)(1) (1988), makes it unlawful to transmit any prospectus unless that prospectus meets the requirements of § 10 of the Act. Section 2(10), 15 U.S.C. § 77b(10), broadly defines "prospectus" to include any writing offering a security for sale or confirming the sale of a security. However, the SEC has approved both preliminary prospectuses and summary prospectuses as meeting the requirements of § 10, and therefore not prohibited by § 5(b)(1). Rule 430, 17 C.F.R. § 230.430 (1992) (preliminary prospectus); Rule 431, 17 C.F.R. § 230.431 (1993) (summary prospectus).

A final prospectus (the final, complete version of the prospectus contained in the registration statement that becomes effective) must be sent to purchasers at the earlier of two times: (1) when a confirmation of the sale is mailed to the purchaser, or (2) when the security purchased is delivered to the purchaser. Securities Act of 1933 §§ 5(b), 2(10), 15 U.S.C. §§ 77e(b), 77b(10) (1988). For an explanation of the complicated way that the statute produces this result, see 1 HAZEN, *supra* note 8, at 81.

<sup>11</sup> Thomas Hazen estimates that the cost of a registered public offering can easily be "more than several hundred thousand dollars when one includes the printing costs, underwriters commissions, directly resulting legal fees and auditing fees, as well as indirect costs that may be necessary to put the company in a position to withstand the public disclosures required in the registration statement." 1 HAZEN, *supra* note 8, at 49. In 1981, Carl Schneider, Joseph Manko, and Robert Kant estimated that the total cost of a typical first-time public offering of several million dollars would range from \$175,000 to \$350,000, plus an underwriting discount or commission of 7-10% of the offering price. Carl W. Schneider, et al., *Going Public: Practice, Procedure and Consequences*, 27 VILL. L. REV. 1, 29-31 (1981).

<sup>12</sup> One article estimated in 1981 that, for a first-time public offering, the lapse of time between beginning to prepare a registration statement and its effective date "may well exceed six months. It rarely will be less than three months." Schneider, et al., *supra* note 11, at 28.

<sup>13</sup> "The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1952).

added cost.<sup>14</sup>

For this and other reasons, the Securities Act does not require that all offerings of securities be registered. The Act exempts from the registration requirements sales both of particular types of securities (securities exemptions)<sup>15</sup> and of securities in particular types of transactions (transaction exemptions).<sup>16</sup> In addition, the Act authorizes the SEC to enact additional exemptions from registration.<sup>17</sup>

The integration doctrine focuses on exempted *transactions* which, because of the nature of the offering, Congress or the SEC has decided do not warrant full registration. A number of different policies underlie these exemptions: a belief that sophisticated or well-informed offerees do not need the protection that registration provides,<sup>18</sup> concern that the cost of compliance is prohibitively

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<sup>14</sup> See authorities cited *infra* notes 21-25.

<sup>15</sup> See Securities Act of 1933 § 3(a), 15 U.S.C. § 77c(a) (1988). Not all of the exemptions in § 3(a) are securities exemptions; some are actually transaction exemptions. 1 HAZEN, *supra* note 8, at 128; STEINBERG, *supra* note 8, at 48.

<sup>16</sup> See Securities Act of 1933 § 4, 15 U.S.C. § 77d (1988).

<sup>17</sup> Section 3(b) of the Securities Act of 1933, 15 U.S.C. § 77c(b) (1988), authorizes the SEC to exempt issues of securities with an aggregate offering price to the public not in excess of \$5 million "if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering." *Id.* Section 3(c) of the Act, 15 U.S.C. § 77c(c) (1988), authorizes the SEC to exempt securities issued by small business investment companies if regulation "is not necessary in the public interest and for the protection of investors." *Id.*

<sup>18</sup> The leading examples of this type of exemption are § 4(2) of the Act and its safe harbor, Rule 506 of Regulation D. Section 4(2) of the Act exempts "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(2) (1988). The legislative history behind this exemption provides little guidance, see 3 LOSS & SELIGMAN, *supra* note 8, at 1350-52, but the Supreme Court has written that § 4(2) was meant to exempt offers to "those who are shown to be able to fend for themselves," or those such as "executive personnel who because of their position have access to the same kind of information that the act would make available in the form of a registration statement." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125-26 (1953).

Rule 506 of Regulation D, 17 C.F.R. § 230.506 (1993), is a safe harbor adopted by the SEC under § 4(2). Securities Act Release No. 6389, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,919 (Mar. 8, 1982). It allows sales of an unlimited amount of securities to two classes of investors: (1) up to 35 purchasers who "either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment," 17 C.F.R. § 230.506(b)(2) (1993); and (2) an unlimited number of "accredited investors," defined to include mainly institutional investors and wealthy individuals. 17 C.F.R. § 230.501(a) (1993).

great for many smaller offerings,<sup>19</sup> or a belief that some authority other than the SEC is better able to regulate the offering.<sup>20</sup>

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<sup>19</sup> Major examples of this type of exemption are Regulation A and Rules 504 and 505 of Regulation D. Rules 504 and 505 of Regulation D were adopted pursuant to the SEC's authority in § 3(b) of the Act to exempt offerings with an aggregate offering price of not more than \$5 million. Securities Act Release No. 6389, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,918 (Mar. 8, 1982). They were "designed primarily for smaller issuers that are not subject to the periodic disclosure requirements and for which the preparation of offering circulars and the expenses resulting from the registration process may be disproportionately burdensome." Securities Act Release No. 6339, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,014, at 84,457 (Aug. 7, 1981).

Rule 504 of Regulation D exempts certain offerings whose aggregate offering price does not exceed \$1 million. 17 C.F.R. § 230.504 (1993). The number of offerees and purchasers is unlimited and very few other restrictions apply. However, companies subject to the reporting requirements of the Securities Exchange Act of 1934 may not use Rule 504. 17 C.F.R. § 230.504(a)(1) (1993).

Rule 505 of Regulation D exempts offerings with an aggregate offering price of up to \$5 million. 17 C.F.R. § 230.505 (1993). Unlike Rule 504, Rule 505 is available to reporting companies, but it is otherwise more restrictive than Rule 504. The issuer may sell to no more than 35 purchasers, 17 C.F.R. § 230.505(b)(2)(ii) (1993), plus an unlimited number of accredited investors, 17 C.F.R. § 230.501(e)(1)(iv) (1993). The issuer must furnish certain information to any purchasers who are not accredited investors, 17 C.F.R. § 230.502(b) (1993); general solicitation of investors and general advertising are prohibited, 17 C.F.R. § 230.502(c) (1993); and resale of the securities sold in the Rule 505 offering is restricted, 17 C.F.R. § 230.502(d) (1993). In addition, Rule 505 is not available to companies that have been involved in certain specified misconduct, 17 C.F.R. §§ 230.505(b)(2)(iii), 230.262 (1993).

Regulation A, another small offering exemption, is discussed *infra* text accompanying notes 31-47.

<sup>20</sup> Three examples of this type of exemption are §§ 3(a)(10) and 3(a)(11) of the Act and, at least in part, Rule 504 of Regulation D. Section 3(a)(10) exempts certain judicially or administratively approved exchanges of securities:

Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

15 U.S.C. § 77c(a)(10) (1988). The justification for this exemption is that "the examination

Even with such exemptions, frequent complaints have been made about the effect of the Securities Act on small business.<sup>21</sup> The argument is that, for

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and approval by the body in question of the fairness of the issue in question is a substitute for the protection afforded to the investor by the information which would otherwise be made available to him through registration." Securities Act Release No. 312, 1 Fed. Sec. L. Rep. (CCH) ¶ 2181-84, at 2591 (Mar. 15, 1935).

Section 3(a)(11) of the Act exempts some intrastate offerings of securities:

Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

15 U.S.C. § 77c(a)(11) (1988). The legislative history of § 3(a)(11) is "sparse," 3 LOSS & SELIGMAN, *supra* note 8, at 1276, but the intent apparently was to relegate such local offerings to state regulation. The 1963 Special Study of Securities Markets stated:

The exemption reflects a congressional policy expressed in various provisions of the Securities Act not to preempt the field of securities regulation or to supersede State control, but rather to fill the gap in those areas where State regulation cannot adequately meet a national need. . . .

. . . It is typically available for the offering by a small businessman of a limited amount of securities to his friends, relatives, business associates, and others . . . . Small local offerings of this character are not a matter of Federal concern, and can be adequately supervised by State authority to the extent that regulation is deemed necessary.

Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, pt. 1, 88th Cong., 1st Sess. 570, 571 (1963).

Rule 504 of Regulation D also falls into this category, at least in part. Although the other two Regulation D exemptions were meant to be uniform exemptions from both federal and state registration provisions, Rule 504 was not. Securities Act Release No. 6389, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,909 (Mar. 8, 1982). For offerings falling within Rule 504, "[b]ecause of the small amount of the offering and the likelihood that sales will occur in a limited geographic area, the [SEC and the North American Securities Administrators Association] believe that greater reliance on state securities laws is appropriate." *Id.*

<sup>21</sup> For an early example, see Gustav B. Margraf, *Does Securities Regulation Hinder Financing Small Business*, 11 LAW & CONTEMP. PROBS. 301 (1945), concluding that "[w]hile the complaints of small business have been exaggerated and the burdens have sometimes been more imaginary than real, there is no doubt that in many instances the financing of small enterprises has been impeded by the registration requirements of the Securities Act." *Id.* at 319; see, e.g., Roy L. Brooks, *Small Business Financing Alternatives Under the Securities Act of 1933*, 13 U.C. DAVIS L. REV. 543, 584 (1980) (stating that "the

businesses raising smaller amounts of money, the expense of completing a registered offering and the associated delay are too costly. Small businesses may not have sufficient funds even to undertake a registered public offering; preliminary financing may be necessary just to complete the registration process.<sup>22</sup> Additionally, because the cost of a registered offering does not vary proportionately with the size of the offering,<sup>23</sup> the cost per dollar of the capital raised is greater in smaller offerings. The cost of raising the capital may exceed the projected yield of the investments for which the money is to be used.<sup>24</sup> Thus, it is argued, the Act discourages capital formation by small businesses and gives large enterprises a government-sponsored comparative advantage.<sup>25</sup>

The SEC has, from time to time, responded to these complaints from small

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inability to raise equity capital is to a large extent a function of the regulatory burden imposed by the 1933 Act"); Rutheford B. Campbell, Jr., *The Plight of Small Issuers Under the Securities Act of 1933: Practical Foreclosure from the Capital Markets*, 1977 DUKE L.J. 1139 (stating that the 1933 Act has made it "difficult or even impossible for a small issuer to raise capital by selling stock").

<sup>22</sup> See generally 3A HAROLD S. BLOOMENTHAL, *SECURITIES AND FEDERAL CORPORATE LAW* 4-220.2-224 (1992 rev.).

<sup>23</sup> Note, *Regulation D: Coherent Exemptions for Small Businesses Under the Securities Act of 1933*, 24 WM. & MARY L. REV. 121, 127 n.43 (1982), and authorities cited therein. For a similar conclusion concerning the Exchange Act's reporting requirements, see Report of the Advisory Comm. on Corporate Disclosure to the SEC, House Comm. on Interstate & Foreign Commerce, 95th Cong., 1st Sess. 513 (1977). Carl Schneider, Joseph Manko, and Robert Kant indicate that "[a]lthough the amount of time, effort, and printing required for an offering is not necessarily related to its dollar size, smaller offerings tend to be somewhat less expensive than the larger ones." Schneider et al., *supra* note 11, at 32.

<sup>24</sup> Campbell, *supra* note 21, at 1140.

<sup>25</sup> The argument that the Securities Act gives an advantage to successful, established businesses at the expense of new, smaller enterprises is almost as old as the Act itself. For example, in 1941, the National Association of Manufacturers submitted a report to a House committee arguing that the Securities Act and the Exchange Act deterred capital formation and, in particular:

These detrimental effects have practically closed the capital markets to small and marginal enterprises, which of necessity must be the embryo for the successful and established enterprise of the future. They have given an enormous advantage to establish enterprise in new developments through the ease by which diversification into such new lines can be effected, as compared with the development of such new lines of activity by new enterprises organized for that purpose alone.

Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934, Hearings Before the House Comm. on Interstate & Foreign Commerce, 77th Cong., 1st Sess. 117 (Oct.-Nov. 1941).

business, liberalizing and expanding some of the exemptions and making their requirements more certain. For example, in 1982, the SEC adopted Regulation D,<sup>26</sup> a collection of three related transaction exemptions for offerings of a relatively small size or offerings to sophisticated investors.<sup>27</sup> The SEC amended Regulation D in the late 1980s to make it even more accessible.<sup>28</sup> However, although Regulation D has been much used<sup>29</sup> and the criticism from small business has weakened, the arguments for greater deregulation persisted after the adoption of Regulation D.<sup>30</sup>

One of the first small offering exemptions enacted by the SEC was Regulation A.<sup>31</sup> Like some of the other exemptions, Regulation A is an attempt to balance the regulatory burden on the small issuer against the need to protect investors.<sup>32</sup> When it was adopted in 1936, Regulation A exempted certain offerings raising up to \$100,000.<sup>33</sup> The dollar limit for Regulation A offerings

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<sup>26</sup> 17 C.F.R. §§ 230.501-508 (1993). In proposing Regulation D, the SEC acknowledged: "The registration requirements of the Securities Act and the exemptive scheme therefrom have been criticized by commentators as disproportionately burdensome for small issuers." Securities Act Release No. 6339, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,014, at 84,454 (Aug. 7, 1981). Regulation D was "the product of the Commission's evaluation of the impact of its rules and regulations on the ability of small businesses to raise capital." Securities Act Release No. 6389, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,907 (Mar. 8, 1982).

<sup>27</sup> See Securities Act Release No. 6339, [1981-82 Transfer Binder] Fed. Sec. L. Rep. ¶ 83,014 (Aug. 7, 1981) (proposing Regulation D); Securities Act Release No. 6389, [1981-82 Transfer Binder] Fed. Sec. L. Rep. ¶ 83,106 (Mar. 8, 1982) (adopting Regulation D). For a discussion of the three Regulation D exemptions, see *supra* notes 18-20.

Regulation D was not the SEC's first attempt to provide safe harbor exemptions of this type. Regulation D replaced three prior limited offering exemptions: Rule 146, adopted in 1974; Rule 240, adopted in 1975; and Rule 242, adopted in 1980. See 3 LOSS & SELIGMAN, *supra* note 8, at 1391-1405.

<sup>28</sup> See Mark A. Sargent, *The New Regulation D: Deregulation, Federalism and the Dynamics of Regulatory Reform*, 68 WASH. U. L.Q. 225 (1990).

<sup>29</sup> "Regulation D became a major channel for the flow of securities, as issuers large and small raised billions of dollars through transactions exempt thereunder." *Id.* at 227.

<sup>30</sup> See Rutheford B. Campbell, Jr., *The Plight of Small Issuers (And Others) Under Regulation D: Those Nagging Problems That Need Attention*, 74 KY. L.J. 127 (1985-86); Sargent, *supra* note 28, at 240-42.

<sup>31</sup> 17 C.F.R. §§ 230.251-263 (1993).

<sup>32</sup> 3A BLOOMENTHAL, *supra* note 22, at 5-3.

<sup>33</sup> The original Regulation A was actually a collection of eleven separate transaction exemptions—"an unconditional exemption for most offerings up to \$30,000, and . . . ten other exemptions that uniformly went to \$100,000 but imposed varying terms and conditions." 3 LOSS & SELIGMAN, *supra* note 8, at 1322. These eleven separate exemptions were repealed, and a single \$100,000 Regulation A exemption was adopted effective in



was raised to \$300,000 in 1945,<sup>34</sup> to \$500,000 in 1972,<sup>35</sup> and again to \$1.5 million in 1978.<sup>36</sup> To use Regulation A, an issuer must file with the SEC a disclosure document known as an offering statement<sup>37</sup> and must provide investors with a prospectus-like document known as an offering circular.<sup>38</sup> In essence, although the use of Regulation A does not involve a statutory registration, Regulation A requires a "mini-registration,"<sup>39</sup> a "less expensive and less burdensome" version of the statutory filing and prospectus delivery requirements.<sup>40</sup>

The 1992 "small business initiatives" included several important amendments to Regulation A intended to make that regulation more accessible to small business.<sup>41</sup> They increased the dollar ceiling for Regulation A

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1941. *Id.*; see Securities Act Release No. 2410, [1941-44 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 75,111 (Dec. 3, 1940).

<sup>34</sup> Securities Act Release No. 3066, (May 22, 1945), *discussed in* 3 LOSS & SELIGMAN, *supra* note 8, at 1323.

<sup>35</sup> Securities Act Release No. 5225, [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,485 (Jan. 10, 1972).

<sup>36</sup> Securities Act Release No. 5977, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,710 (Sept. 11, 1978).

<sup>37</sup> See Rule 252, 17 C.F.R. § 230.252 (1993). This offering statement is filed on Form 1-A. See 2 Fed. Sec. L. Rep. ¶¶ 7325-27C (June 3, 1993).

Originally, no offer of securities could be made in a Regulation A offering until after the offering statement was filed with the SEC. In 1992, the SEC adopted a new test-the-waters provision, Rule 254, which qualified that prohibition. See *infra* note 43 and accompanying text. However, except as allowed by Rule 254, pre-filing offers to sell are still prohibited. Rule 251(d)(1)(i), 17 C.F.R. § 230.251(d)(1)(i) (1993). No actual sales of Regulation A securities may occur until the offering statement has been qualified by the SEC. Rule 251(d)(2), 17 C.F.R. § 230.251(d)(2) (1993).

<sup>38</sup> Rule 253, 17 C.F.R. § 230.253 (1993). The offering circular must include the same narrative and financial information included in the filed offering statement. Rule 253(a), 17 C.F.R. § 230.253(a) (1993). No sales may be made pursuant to Regulation A unless a preliminary or final offering circular is furnished to the investor at least 48 hours prior to mailing the confirmation of sale and a final offering circular is delivered to the investor with, or prior to, the confirmation of sale. Rule 251(d)(2)(i), 17 C.F.R. § 230.251(d)(2)(i) (1993).

<sup>39</sup> 7A J. WILLIAM HICKS, EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933 5-19 (1993 rev.); accord 3A BLOOMENTHAL, *supra* note 22, at 5-3 ("Regulation A, although technically and conceptually a conditional exemption from the registration requirements for many purposes is a less stringent form of registration for relatively small offerings").

<sup>40</sup> 7A HICKS, *supra* note 39, at 5-20.

<sup>41</sup> This paragraph is intended to highlight only some of the changes to Regulation A. It is not a comprehensive summary of the 1992 amendments.

offerings from \$1.5 million to \$5 million.<sup>42</sup> They added a "test-the-waters" provision to allow issuers to solicit potential investors prior to filing the mandated Regulation A offering statement.<sup>43</sup> The 1992 amendments added a substantial compliance provision, similar to one in Regulation D,<sup>44</sup> to protect issuers from some good faith failures to comply fully with the requirements of Regulation A.<sup>45</sup> The 1992 amendments substantially modified Regulation A's procedural and disclosure requirements.<sup>46</sup> And, most importantly for purposes of this Article, the SEC added to Regulation A a new Rule 251(c)<sup>47</sup>—an integration safe harbor protecting Regulation A offerings from integration with other offerings.

### B. *An Introduction to the Integration Doctrine* <sup>48</sup>

The integration doctrine attempts to define what constitutes a single, discrete transaction for the purpose of applying the transaction exemptions from the Securities Act's registration requirements.<sup>49</sup> The doctrine's purpose is to prevent issuers from abusing those exemptions by artificially dividing a single, nonexempt offering into two or more parts in an attempt to obtain an exemption from registration for one or more of the parts.<sup>50</sup> The integration doctrine provides that such artificially separated offers and sales are to be treated as a single offering. An exemption from registration is available only if the entire integrated offering meets the requirements of an exemption.

The integration doctrine is not new; it originated almost contemporaneously with the passage of the Securities Act. In 1933, the Federal Trade Commission ruled that an issuer could not use the intrastate offering exemption to sell part of an issue and then sell the rest of the issue in an

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<sup>42</sup> Rule 251(b), 17 C.F.R. § 230.251(b) (1993). This may include up to \$1.5 million in nonissuer resales. *Id.*

<sup>43</sup> Rule 254, 17 C.F.R. § 230.254 (1993).

<sup>44</sup> Rule 508, 17 C.F.R. § 230.508 (1993).

<sup>45</sup> Rule 260, 17 C.F.R. § 230.260 (1993).

<sup>46</sup> See Adopting Release, *supra* note 6, at 1317.

<sup>47</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

<sup>48</sup> For a more detailed introduction to the integration doctrine, see 1 HAZEN, *supra* note 8 at 232–42; 3 LOSS & SELIGMAN, *supra* note 8, at 1211–28; Perry E. Wallace, Jr., *Integration of Securities Offerings: Obstacles to Capital Formation Remain for Small Businesses*, 45 WASH. & LEE L. REV. 935 (1988).

<sup>49</sup> 1 HAZEN, *supra* note 8, at 232.

<sup>50</sup> 3 LOSS & SELIGMAN, *supra* note 8, at 1211–12; Darryl B. Deaktor, *Integration of Securities Offerings*, 31 U. FLA. L. REV. 465, 473 (1979).

interstate, registered public offering.<sup>51</sup> Eventually, the SEC developed a five-factor test to determine whether two or more ostensibly separate transactions should be integrated and treated as a single offering. This test considers whether

(1) the different offerings are part of a single plan of financing; (2) the offerings involve issuance of the same class of security; (3) the offerings are made at or about the same time; (4) the same type of consideration is to be received; [and] (5) the offerings are made for the same general purpose.<sup>52</sup>

The presence of all five factors is not necessary to integrate two ostensibly separate offerings. The SEC has indicated that “[a]ny one or more” of the factors may be determinative,<sup>53</sup> and, in practice, some of the factors seem to receive more weight than others.<sup>54</sup>

Many courts dealing with integration have followed this five-factor test.<sup>55</sup> However, many commentators have strongly criticized both the five-factor test and its application in SEC no-action letters, the primary source of law in this area. Critics have termed the doctrine uncertain,<sup>56</sup> poorly defined,<sup>57</sup> ambiguous,<sup>58</sup> frustrating and elusive,<sup>59</sup> and even senseless.<sup>60</sup> As Rutherford Campbell concluded, “Everyone seems to agree that these criteria are nearly

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<sup>51</sup> Securities Act Release No. 97 (Dec. 28, 1933), 11 Fed. Reg. 10949, 10950 (Sept. 27, 1946).

<sup>52</sup> Securities Act Release No. 4552, 1 Fed. Sec. L. Rep. (CCH) ¶¶ 2770–83, at ¶ 2781 (Nov. 6, 1962); *accord* Securities Act Release No. 4434, 1 Fed. Sec. L. Rep. (CCH) ¶¶ 2270–77, at ¶ 2272 (Dec. 6, 1961).

<sup>53</sup> Securities Act Release No. 4434, *supra* note 52, at ¶ 2272.

<sup>54</sup> See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 436–38 (1991) (discussing the relative importance to the SEC and courts of each of the factors); 3 LOSS & SELIGMAN, *supra* note 8, at 1222 (reviewing cases and no-action letters suggesting that the “single plan of financing” and “same general purpose” factors are normally given greater weight than the other factors).

<sup>55</sup> *E.g.*, *Donohoe v. Consolidated Operating & Prod. Corp.*, 982 F.2d 1130, 1140 (7th Cir. 1992); *SEC v. Murphy*, 626 F.2d 633, 645–46 (9th Cir. 1980). See generally 3 LOSS & SELIGMAN, *supra* note 8, at 1213 n.8 (collecting cases following the five factor test).

<sup>56</sup> 1 HAZEN, *supra* note 8, at 233.

<sup>57</sup> Kathryn T. Frame, *Securities Regulation: Integration of Securities Offerings*, 34 OKLA. L. REV. 864, 865 (1981).

<sup>58</sup> Frame, *supra* note 57, at 886; Wallace, *supra* note 48, at 989.

<sup>59</sup> Wallace, *supra* note 48, at 937 (“[O]f the various sources of angst facing the small issuer, none has proved more frustrating and elusive than the doctrine of integration of securities offerings.”).

<sup>60</sup> Campbell, *supra* note 30, at 163 (stating that the concept of integration “makes no sense”).

impossible to apply, principally because neither the Commission nor the courts have ever adequately articulated how these factors are to be weighed or how many factors must be present in order for integration to occur."<sup>61</sup>

Critics have also argued that SEC no-action letters interpreting the doctrine are confusing and inconsistent.<sup>62</sup> An American Bar Association subcommittee examining the issue described the no-action letters dealing with integration as "difficult to reconcile even when dealing with similar fact situations involving the same subject matter."<sup>63</sup> Both opponents and proponents of the integration doctrine have argued that the five factors may at times be serving as a subterfuge for other considerations.<sup>64</sup> In short, the doctrine "[engulfs issuers] in a sea of ambiguity, uncertainty, and potential liability."<sup>65</sup>

To correct some of these problems, commentators have proposed various modifications to the integration doctrine.<sup>66</sup> An American Bar Association committee has argued that "the entire concept seriously needs rethinking"<sup>67</sup> and one scholar has argued for the integration doctrine's complete abolition.<sup>68</sup>

The SEC has responded by adopting several integration safe harbors designed to ease some of the uncertainty inherent in the five-factor test. The first such safe harbor, Rule 152, was adopted in 1935.<sup>69</sup> It protects from

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<sup>61</sup> *Id.* at 164; accord Committee on Federal Regulation of Securities, *Integration of Securities Offerings: Report of the Task Force on Integration*, 41 BUS. LAW. 595, 623 (1986); Russell B. Stevenson, Jr., *Integration and Private Placements*, 19 REV. SEC. & COMMOD. REG. 49, 50 (1986); Wallace, *supra* note 48, at 940.

<sup>62</sup> Subcommittee on Partnerships, Trusts and Unincorporated Associations, *Integration of Partnership Offerings: A Proposal for Identifying a Discrete Offering*, 37 BUS. LAW. 1591, 1605 (1982); Stevenson, *supra* note 61, at 50; Wallace, *supra* note 48, at 958.

<sup>63</sup> Subcommittee on Partnerships, Trusts and Unincorporated Associations, *supra* note 62, at 1605.

<sup>64</sup> Ronald L. Fein & Brian J. Jacobs, *Integration of Securities Transactions*, 15 REV. SEC. REG. 785, 792 (Dec. 1982) (stating that the doctrine "has served as a Trojan Horse for the importation of anti-fraud and 'fair and equitable' principles into section 5 of the Securities Act"); Stevenson, *supra* note 61, at 50 ("[T]he staff occasionally appears to have abandoned the factors in favor of one or more other considerations not mentioned in the release"); Wallace, *supra* note 48, at 940 ("[T]he SEC staff and the courts have rendered interpretations of the integration doctrine that appear to involve factors other than those of Release Nos. 4434 and 4552").

<sup>65</sup> Wallace, *supra* note 48, at 989.

<sup>66</sup> See, e.g., Committee on Federal Regulation of Securities, *supra* note 61, at 623; Subcommittee on Partnerships, Trusts and Unincorporated Associations, *supra* note 62, at 1610-23; Wallace, *supra* note 48, at 966-88.

<sup>67</sup> Committee on Federal Regulation of Securities, *supra* note 61, at 596.

<sup>68</sup> Campbell, *supra* note 30, at 167.

<sup>69</sup> See Securities Act Release No. 305 (Mar. 2, 1935), reprinted in Lyman Johnson & Steve Patterson, *The Reincarnation of Rule 152: False Hope on the Integration Front*, 46

integration private offerings exempted by section 4(2) of the 1933 Act if, subsequent to the private offering, "the issuer decides to make a public offering and/or files a registration statement."<sup>70</sup> Later, the SEC incorporated integration safe harbors into Rule 147, the intrastate offering safe harbor;<sup>71</sup> Regulation D;<sup>72</sup> Rule 701, the safe harbor for employee benefit plans;<sup>73</sup> and Rule 144A, the safe harbor for resales of securities to "qualified institutional buyers."<sup>74</sup>

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WASH. & LEE L. REV. 539, 582 (1989).

<sup>70</sup> Rule 152, 17 C.F.R. § 230.152 (1993). The application and interpretation of this seemingly simple rule have been difficult. *See generally* Johnson & Patterson, *supra* note 69.

<sup>71</sup> Rule 147(b)(2) provides:

For purposes of this rule only, an issue shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemptions provided by Section 3 or Section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, *Provided*, that, there are during either of said six month periods no offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) (1993).

<sup>72</sup> Rule 502(a) of Regulation D provides:

Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 under the Act.

Rule 502(a), 17 C.F.R. § 230.502(a) (1993). Integration safe harbors were also in the predecessors to Regulation D—Rules 146, 147, and 240. *See* Deaktor, *supra* note 50, at 514–25.

<sup>73</sup> Rule 701(b)(6) provides: "Offers and sales exempt pursuant to this [Rule 701] are deemed to be a part of a single, discrete offering and are not subject to integration with any other offering or sale whether registered under the Act or otherwise exempt from the registration requirements of the Act." Rule 701(b)(6), 17 C.F.R. § 230.701(b)(6) (1993).

<sup>74</sup> Rule 144A(e) provides: "Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof." Rule 144A(e), 17 C.F.R. § 230.144A(e) (1993). *See generally*

The SEC has also taken a general position against integrating domestic offerings of securities with foreign offerings of those same securities to nonresidents of the United States.<sup>75</sup> The amendment to Regulation A is the SEC's most recent integration safe harbor.

## II. RULE 251(C) AND ITS PURPOSE

The new integration safe harbor, Rule 251(c) of Regulation A, provides:

(c) *Integration with Other Offerings.* Offers and sales made in reliance on this Regulation A will not be integrated with:

- (1) prior offers or sales of securities; or
- (2) subsequent offers or sales of securities that are:
  - (i) registered under the Securities Act, except as provided in Rule 254(d);
  - (ii) made in reliance on Rule 701;
  - (iii) made pursuant to an employee benefit plan;
  - (iv) made in reliance on Regulation S [Rules 901-904]; or
  - (v) made more than six months after the completion of the Regulation A offering.<sup>76</sup>

A note to Rule 251(c) explains that the integration safe harbor is not exclusive. Offers and sales not protected by the safe harbor will be subject to the usual five-factor integration standard.<sup>77</sup>

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C. Steven Bradford, *Rule 144A and Integration*, 20 SEC. REG. L.J. 37 (1992).

<sup>75</sup> In Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) ¶ 1361 (July 9, 1964), the SEC stated:

Generally, transactions otherwise meeting the requirements of [the § 4(2) private offering exemption] need not be integrated with simultaneous offerings being made abroad and, therefore, are not subject to the registration requirements of the Act solely because a foreign offering is being made concurrently with the American private placement which otherwise meets the standards of the exemption.

When it adopted Regulation S for foreign offerings, the SEC stated that "[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously."

Securities Act Release No. 6863, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,681 (Apr. 24, 1990).

<sup>76</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

<sup>77</sup> Rule 251(c)(2), 17 C.F.R. § 230.252(c)(2) (1993). "NOTE: If the issuer offers or sells securities for which the safe harbor rules are unavailable, such offers and sales still

Nothing in the Proposing or Adopting Releases explains Rule 251(c) or the SEC's purpose in adopting it. The Proposing Release merely notes that the proposal: "would provide a 'safe harbor' provision regarding integration of other offerings,"<sup>78</sup> and then paraphrases the rule.<sup>79</sup> The Adopting Release is similarly silent, except for a brief discussion of the relationship between the integration safe harbor and Regulation A's new test-the-waters provision.<sup>80</sup> This silence is troublesome. Rule 251(c) offers unique and expansive protection from integration. At the least, one would expect the SEC to offer some justification for the rule. Explanations of how the rule applies to typical integration problems would also have been helpful. Instead, the SEC merely offered the rule, leaving it to practitioners and scholars to guess why it was adopted and how it will apply. This unfortunately continues recent SEC practice of drastically restricting the application of the integration doctrine without justification or explanation.<sup>81</sup>

The SEC's silence makes a thorough analysis and understanding of the new rule imperative. The only tools available for such an analysis are the text of the rule and the other integration rules and interpretations issued by the SEC. The remainder of this Article attempts to provide what the SEC refused to provide—a basic understanding of Rule 251(c) and its deviation from prior policy. This analysis clarifies why the SEC was reluctant to comment—the new rule goes far beyond prior safe harbors in modifying the integration doctrine.

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may not be integrated with the Regulation A offering, depending on the particular facts and circumstances. See Securities Act Release No. 4552 (November 6, 1962)." Rule 251(c)(2), 17 C.F.R. § 230.251(c)(2) note (1993). Compare Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) note (1993); Rule 502(a), 17 C.F.R. § 230.502(a) note (1993).

<sup>78</sup> Proposing Release, *supra* note 4, at 82,485.

<sup>79</sup> Specifically, the Release states:

A Regulation A offering would not be integrated with any previously completed registered or exempt offering or with any subsequent offering that was registered under the Securities Act, made pursuant to an employee benefit plan, in reliance on Rule 701 or under Regulation S, or made more than six months after the Regulation A offering.

*Id.* In a footnote, the SEC restates what the Note to section 251(c) makes clear: "The longstanding Commission guidance regarding the integration of offerings would continue to be applicable to those offerings which are not within the 'safe harbor' provision. See, Securities Act Release No. 33-4552 (November 6, 1962)." Proposing Release, *supra* note 4, at 82,485 n.61.

<sup>80</sup> See *infra* text accompanying notes 126–31.

<sup>81</sup> See *infra* text accompanying notes 157–58.

### III. THE TWO-SIDED NATURE OF THE SAFE HARBOR

The SEC's integration safe harbors prior to Rule 251(c) have generally provided only "one-sided" protection from integration.<sup>82</sup> Such safe harbors protect only one of the two offerings presenting the integration problem—the one pursuant to the regulation in which the integration safe harbor appears. The other offering is still subject to integration and loss of its exemption.

This point is somewhat obscure in the abstract. The best way to illustrate the meaning and limitations of one-sided protection from integration is by example. Assume that an issuer sold securities on January 1 in compliance with

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<sup>82</sup> See RICHARD JENNINGS ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 450 (7th ed. 1992); 3 LOSS & SELIGMAN, *supra* note 8, at 1224; Campbell, *supra* note 30, at 165; Deaktor, *supra* note 50, at 519–20.

An exception is Rule 701, dealing with compensatory benefit plans. Rule 701, like Regulation A, provides for two-sided protection from integration. It provides that "[o]ffers and sales exempt pursuant to this [Rule 701] are deemed to be a part of a single, discrete offering and are not subject to integration with any other offering or sale whether registered under the Act or otherwise exempt from the registration requirements of the Act." Rule 701(b)(6), 17 C.F.R. § 230.701(b)(6) (1993). The SEC release adopting Rule 701 makes it clear that this language was intended to provide two-sided protection:

The possible integration of Rule 701 offerings with other offerings is a matter of concern and has been repeatedly raised by commenters and noted by the Commission. Rule 701 addresses this concern by specifically stating that all offers and sales pursuant to its rubric are deemed to be a part of a single, discrete offering; consequently, Rule 701 transactions need not be integrated into any other offering made by the issuer *or vice versa*.

Securities Act Release No. 6768, [1987–88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,231, at 89,063 (Apr. 14, 1988) (emphasis added). The "or vice versa" language makes it clear that two-sided protection from integration was intended.

William Hicks argues that the Rule 701 safe harbor "is one directional." 7A HICKS, *supra* note 39, at 8–45, but his argument is based on a misreading of Release No. 6768. Hicks's interpretation is based on the sentence immediately following the material quoted above. That sentence states that "as public offerings are permitted under Rule 701, a general solicitation issue may result where offering materials for a Rule 701 transaction are generally used and an issuer is relying upon some other exemption for a limited offering involving the same or a similar compensation plan or arrangement." Securities Act Release No. 6768, *supra*, at 89,063–64. Given the language quoted earlier, it is clear that the SEC intended a two-sided safe harbor. The sentence quoted by Hicks is merely pointing out that, if the Rule 701 offering materials are broadly distributed, they might become available to the offerees in the limited offering, producing, even without integration, a general solicitation in violation of the limited offering's exemption.



section 3(a)(11) of the Act, the intrastate offering exemption.<sup>83</sup> Assume also that, although this offering met the requirements of section 3(a)(11), it did not qualify for the Rule 147 intrastate offering safe harbor.<sup>84</sup> On August 1, the issuer sold the same class of securities in an offering complying with one of the Regulation D exemptions.

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January 1.....Section 3(a)(11) sales

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August 1.....Regulation D sales

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Regulation D's integration safe harbor, Rule 502(a), provides that, with certain conditions not important to this example, offers and sales more than six months before the start of the Regulation D offering "will not be considered part of that Regulation D offering."<sup>85</sup> The January 1 intrastate offering occurred more than six months prior to the Regulation D offering, so, under Rule 502(a), those earlier sales would not be considered part of the Regulation D offering. The intrastate sales would not be "integrated into" the Regulation D offering and, thus, would not directly destroy the Regulation D exemption.<sup>86</sup> However, the protection from integration only runs in one direction. Rule 502(a) does not provide that the Regulation D sales will not be considered part of the January 1 offering, for the purpose of determining if the section 3(a)(11) exemption was available. Thus, the section 3(a)(11) exemption is still at risk. Applying the normal five-factor test, the later Regulation D sales might be integrated into the section 3(a)(11) offering and, assuming that some of the Regulation D sales were to nonresidents, destroy the section 3(a)(11) exemption.<sup>87</sup>

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<sup>83</sup> Securities Act of 1933 § 3(a)(11), 15 U.S.C. § 77c(a)(11) (1988).

<sup>84</sup> This assumption is necessary because Rule 147 has its own integration safe harbor. *See* Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) (1993).

<sup>85</sup> Rule 502(a), 17 C.F.R. § 230.502(a) (1993). The integration safe harbor in Rule 147 is similar in this respect. It provides: "*For purposes of this rule only*, an issue shall be deemed not to include offers . . ." Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) (1993) (emphasis added).

<sup>86</sup> As I subsequently explain, those earlier sales will *indirectly* affect the Regulation D exemption. *See infra* note 87.

<sup>87</sup> This would, in turn, affect the Regulation D exemption for the August 1 sales. If, as

Two-sided protection is provided by prior integration safe harbor rules only if each of the two offerings is protected by its own integration safe harbor. For example, if the first offering in the prior example were pursuant to Rule 147, a similar, one-sided integration safe harbor would also apply to the Rule 147 offering.<sup>88</sup> Rule 502(a) would preclude the Rule 147 offering from being integrated into the Regulation D offering and the Rule 147 integration safe harbor, Rule 147(b)(2), would preclude the Regulation D offering from being integrated into the Rule 147 offering. Each exemption would be protected.

One-sided protection from integration is better than nothing, but it offers little solace to an issuer seeking to comply with the Act's registration provisions. If two offerings would otherwise be integrated, a one-sided integration safe harbor only keeps the issuer from violating the Act twice, rather than once. The offering without the integration safe harbor would still violate the Act. The only way an issuer can avoid integration problems entirely is to use only exemptions that contain their own one-sided integration safe harbors. As long as all offerings are pursuant to an exemption with its own protection from integration, the one-sidedness of the integration safe harbors is irrelevant. This encourages the use of SEC safe harbors like Regulation D and Rule 147, over which the SEC has greater control, and discourages the use of the potentially broader statutory exemptions, such as section 4(2) or section 3(a)(11). Such statutory offerings risk integration with other offerings, since the statutory exemptions have no integration safe harbor, but are subject to the uncertain five-factor test.

Unlike these earlier integration safe harbors, the new Regulation A integration safe harbor is two-sided.<sup>89</sup> Rule 251(c) provides simply that Regulation A offerings "will not be integrated with" any of the other offerings listed in the rule.<sup>90</sup> It does not say only that the other offerings will not be part

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a result of integration, the § 3(a)(11) exemption is no longer available for the January 1 sales, those sales were in violation of the Act. The available aggregate offering price for both Rule 504 and Rule 505 offerings must be reduced by the amount of all securities sold within the past 12 months "in violation of section 5(a) of the Securities Act." Rule 504(b)(2), 17 C.F.R. § 230.504(b)(2) (1993). *Compare* Rule 505(b)(2), 17 C.F.R. § 230.505(b)(2) (1993) (essentially the same result, but slightly different language). Thus, the dollar limitation on the aggregate offering price of the Regulation D offering would have to be reduced by the amount of the January 1 offering, since, as a result of integration, the earlier offering violated § 5(a).

<sup>88</sup> Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) (1993).

<sup>89</sup> In a recent discussion, Bloomenthal assumes that the Regulation A integration safe harbor is only one-sided. 3A BLOOMENTHAL, *supra* note 22, at 5-12 to 5-14. Bloomenthal does not justify this assumption, and it appears to be inconsistent with the plain language of the Rule.

<sup>90</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

of the Regulation A offering; it says simply and directly that the two will not be integrated. Rule 251(c) would preclude integration of the other offering into the Regulation A offering to destroy the Regulation A exemption, and it would also preclude integration of the Regulation A offering into the other offering to destroy the other offering's exemption.<sup>91</sup> Rule 251(c) thus provides equal protection to all exempted offerings, whether or not those other offerings have their own integration safe harbor. Statutory exemptions are treated equally with the SEC safe harbor exemptions, removing the artificial pressure to use one instead of the other, at least insofar as possible integration with a Regulation A offering is concerned.

#### IV. APPLICATION TO PRIOR OFFERS AND SALES

Rule 251(c)'s protection of prior offers and sales is broad and unequivocal. Rule 251(c)(1) provides, with no exceptions, that Regulation A offers and sales will not be integrated with prior offers and sales.<sup>92</sup> This safe harbor does not depend on whether the purposes of the two offerings are different, whether the same security is offered in the two offerings, how close the two offerings are in time, or anything of the sort.<sup>93</sup> Even if the Regulation A offering occurs only one week after an offering pursuant to some other exemption is completed, the same security is sold, both offerings were planned as part of a single plan of financing, and the funds will be used for the same specific purpose, the two offerings apparently will not be integrated.<sup>94</sup> In essence, Rule 251(c)(1) allows a Regulation A offering to supplement any other offering, as long as the other offering is completed before the Regulation A offering is begun. The integration doctrine is entirely eliminated for prior offerings.

Moreover, unlike Rules 504 and 505 of Regulation D, the aggregate offering price limitations of Regulation A do not affect the utility of the Rule 251(c)(1) integration safe harbor. The \$5 million aggregate offering price limitation in Rule 251(b) is reduced only by the amount of prior sales "in reliance upon Regulation A."<sup>95</sup> Prior sales pursuant to any other exemption would not affect the amount that could be sold pursuant to Regulation A.<sup>96</sup>

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<sup>91</sup> *See id.*

<sup>92</sup> Rule 251(c)(1), 17 C.F.R. § 230.251(c)(1) (1993).

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> Rule 251(b), 17 C.F.R. § 230.251(b) (1993).

<sup>96</sup> Aggregation would not be a problem even if the prior offering were pursuant to Regulation D. Rules 504 and 505 of Regulation D, which have aggregate offering price limitations, require that the limit be reduced by "the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of

Regulation A also has no provision like Preliminary Note 6 to Regulation D, which provides that Regulation D is not available for transactions in technical compliance with the rules that are "part of a plan or scheme to evade the registration provisions of the Act."<sup>97</sup> It is not clear precisely what this Note means, but the SEC has indicated that such a provision could be used to integrate where an integration safe harbor otherwise appears to be available.<sup>98</sup> However, Regulation A has no such cautionary note and, given the clear language of Rule 251(c)(1), the SEC would have difficulty arguing that the two offerings should be integrated because they constitute an attempt to artificially separate a single offering to improperly evade the registration requirements. The whole point of Rule 251(c)(1) seems to be to allow the artificial separation of two offerings that would otherwise be integrated under the five-factor test.

The possibilities under Rule 251(c)(1) are numerous. A Regulation A offering could immediately follow an interstate offering, a Regulation D offering, a section 4(2) offering, or any other type of exempt offering. Among other things, Rule 251(c)(1) renders Rule 152 superfluous as applied to Regulation A offerings. Rule 152 protects section 4(2) private offerings from integration if, subsequent to the private offering, "the issuer decides to make a public offering and/or files a registration statement."<sup>99</sup> The "public offering" language in Rule 152 includes subsequent offerings pursuant to Regulation A.<sup>100</sup> Now, however, Rule 152's protection is unnecessary for Regulation A offerings. A section 4(2) private offering followed by a Regulation A offering would be protected from integration by Rule 251(c)(1).<sup>101</sup>

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securities under this [Rule], in reliance on any exemption under § 3(b) . . . ." Rule 504(b)(2), 17 C.F.R. § 230.504(b)(2) (1993); Rule 505(b)(2), 17 C.F.R. § 230.505(b)(2) (1993). Regulation A is a § 3(b) exemption but Rule 251(c)(1) applies only if the Rule 504 or 505 offering is prior to the Regulation A offering. In that context, none of the Regulation A securities would have been sold prior to or during the Rule 504 or Rule 505 offering and thus would not affect the Rule 504 or 505 limits.

<sup>97</sup> Regulation D, 17 C.F.R. § 230.501 preliminary note 6 (1993).

<sup>98</sup> See Securities Act Release No. 6862, 55 Fed. Reg. 17,933, 17,935 n.20 (Apr. 30, 1990) (involving a similar cautionary note in Rule 144A).

<sup>99</sup> Rule 152 provides: "The phrase *transactions by an issuer not involving any public offering* in section 4(2) shall be deemed to apply to transactions not involving any public offering at the time of said transactions although subsequently thereto the issuer decides to make a public offering and/or files a registration statement." Rule 152, 17 C.F.R. § 230.152 (1993) (citation omitted). For an extensive discussion of Rule 152, see Johnson & Patterson, *supra* note 69.

<sup>100</sup> 1 HAZEN, *supra* note 8, at 239 n.52; JENNINGS, *supra* note 82, at 451; Deaktor, *supra* note 50, at 497 n.206.

<sup>101</sup> One issue under Rule 152 has been whether the decision to make the public offering must be made subsequent to the private offering. See Johnson & Patterson, *supra*

## V. APPLICATION TO SUBSEQUENT OFFERS AND SALES

Rule 251(c)'s protection from integration of offers and sales subsequent to the Regulation A offering is more limited than its protection of prior offers and sales. Rule 251(c) provides two types of safe harbors for subsequent sales: (1) a general safe harbor for any sales occurring more than six months after completion of the Regulation A offering, and (2) safe harbors protecting particular types of subsequent offerings, even within the six-month period.<sup>102</sup>

### A. The Six-Month Safe Harbor

#### 1. *The Basic Six-Month Safe Harbor and the Problem of Intervening Sales*

The most broadly applicable protection of subsequent offers is in Rule 251(c)(2)(v), which protects from integration offers or sales "made more than six months after the completion of the Regulation A offering."<sup>103</sup> This six-month period is the same as that in the Rule 147 and Regulation D safe harbors, but the Regulation A integration safe harbor is somewhat broader than those other rules. First, as previously discussed, Rule 251(c) provides two-sided protection from integration; the protection in Rule 147 and Rule 502 is only one-sided.<sup>104</sup> Second, the Rule 147 and Rule 502 safe harbors are contingent on there being no other offers or sales of the same or a similar class of securities during the six month period. If there are any intervening offers or sales of the same or a similar class of securities within the six-month period, the Rule 502 and Rule 147 safe harbors are unavailable.<sup>105</sup> Rule 251(c)(2)(v) has no such limitation.

Assume, for example, that an issuer completed a Regulation D offering on January 1, made a single sale of the same class of stock on April 1, then began a section 4(2) private offering on July 15.

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note 69, at 549-56 (offering three possible interpretations of Rule 152). That issue does not arise under Regulation A's new safe harbor. The availability of Rule 251(c)(1) does not turn on whether the two offerings are part of a single, preplanned financing.

<sup>102</sup> See Rule 251(c)(2), 17 C.F.R. § 230.251(c)(2)(1993).

<sup>103</sup> Rule 251(c)(2)(v), 17 C.F.R. § 230.251(c)(2)(v) (1993).

<sup>104</sup> See *supra* text accompanying notes 82-91.

<sup>105</sup> See *infra* text accompanying notes 106-107. Rule 502 excepts from this prohibition offers or sales under an employee benefit plan. Rule 502(a), 17 C.F.R. § 230.502(a) (1993).

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January 1.....	Regulation D sales
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April 1.....	Single sale (same class)
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July 15.....	Section 4(2) private offering

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Although the January 1 and July 15 offerings are more than six months apart, the Rule 502(a) six-month safe harbor would not be available.<sup>106</sup> The Rule 502(a) safe harbor is available only "so long as during [the six-month period] there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D."<sup>107</sup> The single sale on April 1 thus eliminates the safe harbor; the five-factor test would then determine whether the July 15 sales would be integrated into the January 1 sales to destroy the Regulation D exemption. It is irrelevant for purposes of the safe harbor whether, applying the five-factor test, the April 1 sales would be integrated into either the January 1 offering or the July 15 offering. As long as the April 1 sale is of the same or a similar class of security as the Regulation D offering, the integration safe harbor is lost and the January 1 and July 15 offerings might be integrated.

The Rule 251(c)(2)(v) safe harbor, on the other hand, is not conditioned on an absence of offers or sales in the six-month period. In many cases, however, that difference may be more apparent than real. Assume that the January 1 offering was pursuant to Regulation A, with the original example otherwise unchanged.

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<sup>106</sup> The same conclusion would hold if the initial offering were pursuant to Rule 147, which has a six-month safe harbor similar to that in Regulation D. *See* Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2) (1993).

<sup>107</sup> Rule 502(a), 17 C.F.R. § 230.502(a) (1993). I assume that the April 1 sale is not pursuant to an employee benefit plan.

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January 1.....	Regulation A sales
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.	
April 1.....	Single sale (same class)
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.	
.	
July 15.....	Section 4(2) private offering

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The six-month safe harbor in Rule 251(c)(2)(v) would not protect the April 1 sale from integration with the Regulation A sales, because those transactions are less than six months apart. However, because the six-month safe harbor is not conditioned on an absence of intervening sales, Rule 251(c)(2)(v) would appear to protect the January 1 Regulation A offering from integration with the July 15 section 4(2) offering.<sup>108</sup>

In practice, however, the Regulation A offering and the section 4(2) offering will be protected from integration only if, under the five-factor test, the April 1 sale would not be integrated with either the January 1 Regulation A offering or the July 15 section 4(2) offering. Assume first that the April 1 sale is of a type that, under the five-factor integration test, would not be integrated with either of the other two offerings. Here, integration is not a problem, although it could be under the Rule 147 or Regulation D integration safe harbors. Rule 251(c)(2)(v) precludes integration of the Regulation A offering and the section 4(2) offering, because they are more than six months apart, and the five-factor test precludes integration of either the Regulation A offering and the April 1 offering, or the April 1 offering and the July 15 offering. Under

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<sup>108</sup> Rule 251(c)(2), 17 C.F.R. § 230.251(c)(2) (1993). In essence, Rule 251(c)(2) treats any offers or sales during the six-month period in the same way that Rule 502(a) treats offers and sales under an employee benefit plan. Rule 502(a) generally denies the six-month safe harbor if there are offers or sales of the same or a similar class of securities during the six months, but not if those intervening offers and sales are “under an employee benefit plan as defined in Rule 405 under the Act.” Rule 502(a), 17 C.F.R. § 230.502(a) (1993). However, that exception does not preclude the sales pursuant to the employee benefit plan from being integrated with the offers and sales on either side of the six-month safe harbor. *See* Securities Act Release No. 6339, [1981-82 Transfer Binder] Fed. Sec. L. Rep. ¶ 83,014, at 84,462 n.25 (Aug. 7, 1981); Securities Act Release No. 6455, Fed. Sec. L. Rep. ¶ 2380, at 2637-11 & n.41 (Mar. 3, 1983).

Rule 147 or Regulation D, on the other hand, if the April 1 offering were of the same or a similar class of securities as the Regulation D or Rule 147 offering, the six-month safe harbor would automatically be lost, whether or not the April 1 offering would be integrated with the other two under the five-factor test.

But Rule 251(c)(2)(v) does not allow an issuer to disregard completely sales in the six-month period. Assume now that, under the five-factor test, the April 1 offering would be integrated with either the Regulation A offering or the July 15 section 4(2) offering, or both. The Regulation A exemption could then be lost because of the integration of the Regulation A offering and the April 1 offering. They are not six months apart, so they are not protected from integration by Rule 251(c)(2).<sup>109</sup> The July 15 offering could also be integrated with the April 1 offering; Rule 251(c) protects two offerings from integration only when one of those offerings is pursuant to Regulation A. Thus, the single sale within the six-month period could cause the loss of both the Regulation A exemption for the January 1 offering and the section 4(2) exemption for the July 15 offering.<sup>110</sup>

## 2. *The Interaction of the Six-Month Safe Harbor and Other Safe Harbors*

The analysis of intervening sales is slightly more complicated if the April 1 sale in the example above falls within one of the other categories of subsequent offerings Rule 251(c)(2) protects from integration. Assume, for example, that the April 1 sale was pursuant to an employee benefit plan; subsequent offerings pursuant to employee benefit plans are protected against integration by Rule 251(c)(2)(iii).<sup>111</sup> Thus, the safe harbor would prevent the Regulation A offering from being integrated with the April 1 sale. The July 15 offering would not be integrated with the January 1 Regulation A offering because it occurred more than six months after the Regulation A offering was completed.<sup>112</sup> However,

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<sup>109</sup> This assumes that the April 1 offering does not fall into any of the other Rule 251(c)(2) categories of protected subsequent offerings.

<sup>110</sup> A similar argument is that, upon integration, the original Regulation A offering and the April 1 offering are both part of the same Regulation A offering. Therefore, the six-month period runs from the conclusion of the integrated Regulation A offering, which occurs on April 1. Because the subsequent July 15 offering is not more than six months after April 1, the Rule 251(c)(2)(v) safe harbor is not available.

The possible application of Regulation A's substantial compliance rule to this example to avoid integration is discussed *infra* text accompanying notes 145-49.

<sup>111</sup> Rule 251(c)(2)(iii), 17 C.F.R. § 230.251(c)(2)(iii) (1993). See *infra* text accompanying notes 118-19.

<sup>112</sup> Rule 251(c)(2)(v), 17 C.F.R. § 230.251(c)(2)(v) (1993).



nothing in Rule 251(c) would prevent the integration of the April 1 offering with the July 15 offering; integration of these two offerings would be analyzed under the SEC's five-factor test.

Assume that the April 1 offering and the July 15 offering are integrated and that this destroys the section 4(2) exemption for the July 15 offering. Does this in any way affect the Regulation A exemption for the January 1 offering? It might, for two reasons. First, as I discuss later,<sup>113</sup> at least one authority has suggested that Rule 251(c) was not intended to protect Regulation A offerings from integration with offerings violating the Act. If this interpretation is correct, the integrated April 1–July 15 offering, which as a result of integration has no exemption and violates the Act, might be integrated with the Regulation A offering even though six months have passed.

Second, Rule 251(c)(2)(v) might be read as requiring that not just the July 15 sales, but also the entire offering of which they are a part, occur more than six months after the Regulation A offering. As a result of the application of the five-factor test, the April 1 employee benefit offering is part of the July 15 offering, and it was within six months of the Regulation A offering. For that reason, the Rule 251(c)(2)(v) safe harbor would not be available.

The problem with this interpretation is two-fold. First, Rule 251(c)(2) says that a Regulation A offering will not be integrated with “subsequent *offers* or *sales*,”<sup>114</sup> not offerings. This language appears to consider only whether individual offers and sales are after the six-month period, not the entire offering of which they are a part. Admittedly, the title of Rule 251(c) is “Integration with Other Offerings” and the Proposing Release refers to “offerings” in describing the safe harbor’s scope.<sup>115</sup> But, even if this interpretation is plausible, it is hard to see why it is desirable. If Rule 251(c)(2)(iii) would protect the April 1 sale, standing alone, from integration, and Rule 251(c)(2)(v) would protect the July 15 sales, standing alone, from integration, it is difficult to see why the combination of the two should not also be protected from integration with the Regulation A offering.

### *3. Aggregation Problems When the Subsequent Offering is Pursuant to Regulation D*

Even after six months, a potential problem exists if the subsequent offering is pursuant to Rules 504 or 505 of Regulation D. Regulation A is an exemption under section 3(b) of the 1933 Act, and both Rule 504 and Rule 505 require

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<sup>113</sup> See *infra* text accompanying notes 137–39.

<sup>114</sup> Rule 251(c)(2), 17 C.F.R. § 230.251(c)(2) (1993).

<sup>115</sup> Proposing Release, *supra* note 4, at 82,485.

that the available aggregate offering price be reduced by the amount of any section 3(b) offerings within the twelve months prior to the Regulation D offering.<sup>116</sup> Thus, although integration is not a problem after six months, the available aggregate offering price for a subsequent offering pursuant to Regulation D would be affected for another six months after that.

### *B. The Other Safe Harbors for Subsequent Offers and Sales*

The Rule 251(c) safe harbor also protects from integration subsequent offerings falling into certain substantive categories, even if they occur within six months. If the subsequent offering is a registered offering,<sup>117</sup> an offering pursuant to a compensatory benefit plan under Rule 701,<sup>118</sup> any other offering pursuant to an employee benefit plan,<sup>119</sup> or a Regulation S foreign offering,<sup>120</sup> it will not be integrated with the Regulation A offering.

None of these exemptions from integration is particularly surprising. The protection from integration of subsequent Regulation S offerings is consistent with the preexisting SEC position of not integrating domestic offerings with simultaneous offerings made outside the United States in a manner that will result in those securities coming to rest abroad.<sup>121</sup> The protection of offerings pursuant to Rule 701 is also not novel. Rule 701 itself contains a safe harbor precluding the integration of Rule 701 offerings with other offerings.<sup>122</sup> Rule 251(c) adds nothing to the protection Rule 701 already offers. Rule 251(c)(2)(iii) does, however, extend protection from integration to other employee benefit offerings, not just those pursuant to Rule 701. The protection from integration of subsequent registered public offerings is also not novel. In essence, Rule 251(c) grants protection to Regulation A offerings similar to that which Rule 152 grants to section 4(2) offerings. Under Rule 152, a subsequent registered offering will not destroy the exemption of a prior private offering

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<sup>116</sup> Rule 504(b)(2), 17 C.F.R. § 230.504(b)(2) (1993); Rule 505(b)(2)(i), 17 C.F.R. § 230.505(b)(2)(i) (1993).

<sup>117</sup> Rule 251(c)(2)(i), 17 C.F.R. § 230.251(c)(2)(i) (1993). This is limited somewhat by Rule 254(d). See *infra* text accompanying notes 126–31.

<sup>118</sup> Rule 251(c)(2)(ii), 17 C.F.R. § 230.251(c)(2)(ii) (1993).

<sup>119</sup> Rule 251(c)(2)(iii), 17 C.F.R. § 230.251(c)(2)(iii) (1993).

<sup>120</sup> Rule 251(c)(2)(iv), 17 C.F.R. § 230.251(c)(2)(iv) (1993).

<sup>121</sup> See Regulation D, 17 C.F.R. § 230.501 preliminary note 7 (1992); Securities Act Release No. 6455, Fed. Sec. L. Rep. ¶ 2380, at 2637-12 (Mar. 3, 1983); Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) ¶ 1361 (July 9, 1964).

<sup>122</sup> Rule 701(b)(6) exempts offerings under Rule 701 from integration with any other offering or sale. Rule 701(b)(6), 17 C.F.R. § 230.701(b)(6) (1993). This protection is two-sided. See *supra* note 82 for a discussion of this two-sided protection.

even if the two offerings might be integrated under the five-factor test. Rule 251(c)(2)(i) does not contain the requirement, arguably found within Rule 152, that the decision to pursue the registered public offering be made only after the exempted offering is completed or aborted.<sup>123</sup> However, the SEC staff has essentially read that requirement out of Rule 152,<sup>124</sup> so Rule 251(c)(2)(i) is quite similar to Rule 152 as applied. The registered public offering exception thus allows Regulation A to be used in much the same way that Rule 152 allows the private offering exemption to be used—as first-tier financing to raise funds to pay for a subsequent registered offering.<sup>125</sup>

### C. Integration and Regulation A's Test-the-Waters Provisions

Regulation A actually has not one, but two, integration safe harbors. One is section 251(c). The other is Rule 254(d), which applies only when a Regulation A offering is aborted and a subsequent registered public offering is made. As originally proposed, Rule 251(c)(2)(i) protected from integration simply subsequent offerings "registered under the Securities Act."<sup>126</sup> The SEC added the limitation "except as provided in Rule 254(d)" to answer questions concerning the interaction of the Rule 251(c) integration safe harbor and the test-the-waters provisions of Rule 254. Rule 254(d) applies only where an issuer has begun to solicit interest in a Regulation A offering, as allowed by Rule 254, then decides to register the offering rather than use Regulation A.

Whether Rule 254(d) or Rule 251(c) applies to an aborted Regulation A

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<sup>123</sup> Rule 152 protects the § 4(2) offering from integration "although *subsequently thereto* the issuer decides to make a public offering and/or files a registration statement." Rule 152, 17 C.F.R. § 230.152 (1993) (emphasis added).

<sup>124</sup> In a series of no-action letters, the SEC staff has held that Rule 152 protects against integration when an issuer files a registration statement after a private offering is completed or abandoned, even if the public offering was contemplated when the private offering was initiated. *See, e.g.*, Vulture Petroleum Corp., SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,407 (Dec. 31, 1987); BBI Assocs., SEC No-Action Letter, 1986 WL 67522 (avail. Dec. 29, 1986). For a detailed discussion of these and other, similar no-action letters, see Johnson & Patterson, *supra* note 69, at 556–61. *See also* Black Box, Inc., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,510, at 77,579 (June 26, 1990) (for purposes of Rule 152, the private placement is completed when the investment decision is made, even if the securities are not actually issued until after the public offering). For a more extensive discussion of the *Black Box* letter, see Gerald S. Backman & Robert M. Gervis, *Integration Revisited: The Black Box Restructuring*, 5 INSIGHTS No. 2 (Feb. 1991).

<sup>125</sup> For a general discussion of the problems of preliminary financing, see 3A BLOOMENTHAL, *supra* note 22, at 4-220.2 to 4-224.

<sup>126</sup> Proposed Rule 251(c), in Proposing Release, *supra* note 4, at 82,520.

offering depends on how far the offering has proceeded before it is abandoned and, in particular, on whether or not the issuer has already filed the Rule 252 offering statement. If the issuer began to test the waters, but did not file the Regulation A offering statement with the SEC, Rule 254(d) applies and protects a subsequent registered offering from integration if the issuer had "a bona fide change of intention" and "if at least 30 calendar days have elapsed between the last solicitation of interest and the filing of the registration statement with the Commission"<sup>127</sup> and "all solicitation of interest documents have been submitted to the Commission."<sup>128</sup> The Commission explained that it "does not believe it to be in either the investors' or the issuer's interest to deter resort to a registered offering because of a good faith change of plans."<sup>129</sup> Rule 254(d) is apparently only a safe harbor; if the requirements of Rule 254(d) are not met, an issuer would still be able to argue against integration under the five-factor test. If, for example, the issuer filed a registration statement within thirty days of the aborted Regulation A offering, Rule 254(d) would not protect against integration, but integration would not be automatic. However, given the likely close relationship between the aborted Regulation A offering and the subsequent public offering, the five-factor test would often call for integration. Thus, it is clearly safer for the issuer to wait thirty days if possible.<sup>130</sup>

If the issuer filed the Rule 252 offering statement before deciding to abort the Regulation A offering, Rule 254(d) does not apply, and the usual Rule 251(c) integration safe harbor would apply.<sup>131</sup> In that case, Rule 251(c)(2)(i) would protect the aborted Regulation A offering and the subsequent registered

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<sup>127</sup> In the Adopting Release, the SEC phrases the Rule 254(d) integration safe harbor slightly differently. It says that Rule 254(d) applies if "at least 30 days had elapsed between the issuer's last use of a written testing of the waters document and the filing of the registration statement." Adopting Release, *supra* note 6, at 62,170. Thus, when Rule 254(d) says "the last solicitation of interest," the Commission is apparently referring only to the last use of the written document. If, for example, an issuer furnished the written solicitation interest document to a purchaser on Day 1, communicated orally with that purchaser on Day 15, then filed a registration statement on Day 31, Rule 254(d) would apparently be available, because the last use of the written document was at least 30 days earlier.

<sup>128</sup> Rule 254(d), 17 C.F.R. § 230.254(d) (1993).

<sup>129</sup> Adopting Release, *supra* note 6, at 62,170.

<sup>130</sup> A possible alternative, if 30 days is too long a wait, would be to file the Rule 252 offering statement, then immediately file an amendment indicating that the Regulation A offering had been aborted. Once the Rule 252 offering statement was filed, Rule 254(d) would not apply, and the usual Rule 251(c) safe harbor would be available to protect the subsequent registered offering. This is dangerous, however, because filing a Rule 252 offering statement not intending to proceed with the offering could be considered fraudulent.

<sup>131</sup> Adopting Release, *supra* note 6, at 62,170.

offering from integration.

## VI. SIMULTANEOUS OFFERS AND SALES

Rule 251(c) only protects Regulation A offerings from integration with prior or subsequent offers and sales. It provides no protection for offers and sales occurring simultaneously with the Regulation A offering.<sup>132</sup> Under Rule 251(c), other offers can be made until the day the Regulation A offering begins and then, if those offers fall into one of the Rule 251(c)(2) categories, can resume the day after the Regulation A offering is completed.<sup>133</sup> They cannot, however, be made during the Regulation A offering. The policy rationale for completely excluding simultaneous offers from protection against integration is unclear. If, for example, registered offerings that begin one day after the Regulation A offering is completed should be protected against integration, why not those that begin a mere two days earlier? Form is apparently what matters; there is no substantive reason to treat the two offerings differently.

In certain cases, however, simultaneous offerings may be protected in spite of the limitations in Rule 251(c). For example, Rule 701 provides broadly that Rule 701 offerings "are not subject to integration with any other offering or sale whether registered under the Act or otherwise exempt from the registration requirements of the Act."<sup>134</sup> The timing of the offerings is irrelevant. Thus, a Rule 701 offering could be made prior to, during, or subsequent to the Regulation A offering without any integration problem. Similarly, the SEC has taken the position that foreign offerings will in some cases not be integrated with domestic offerings, even when those offerings are simultaneous.<sup>135</sup> Thus, an offering pursuant to Regulation S could also be made prior to, during, or subsequent to the Regulation A offering without an integration problem. Nothing would protect a Regulation A offering and a simultaneous registered offering from integration, but it is unclear why an issuer would want to make such simultaneous offerings. If part of the offering is to be registered, the marginal cost of registering the remainder is probably small. Thus, the lack of protection for simultaneous registered offerings is of little practical consequence. Given these instances where simultaneous offerings would be

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<sup>132</sup> "The provision . . . requires the prior exempt or registered offering to have been completed; it is not a safe harbor for concurrent offerings." 3A BLOOMENTHAL, *supra* note 22, at 5-12.

<sup>133</sup> The SEC might take the position that the entire offering, rather than individual offers and sales, must be prior or subsequent to the Regulation A offering. For a rejection of this interpretation, see *supra* text accompanying notes 114-15.

<sup>134</sup> Rule 701(b)(6), 17 C.F.R. § 230.701(b)(6) (1993).

<sup>135</sup> See *supra* authorities cited in note 121.

protected from integration, the limitation of Rule 251(c) only to prior or subsequent offerings is little more than a trap for the unwary. If an isolated sale from some other offering inadvertently overlaps the Regulation A offering, the integration safe harbor is lost and both offerings are at risk.

## VII. SOME LINGERING ISSUES

I have shown that the SEC's silence in adopting the new Rule 251(c) safe harbor has produced uncertainty concerning the basic application of the rule. Rule 251(c) raises at least two other issues. One of these issues—whether the rule protects from integration even offers or sales in violation of the Act—appears to be clearly answered by the language of the rule.<sup>136</sup> However, at least one commentator has questioned whether the SEC really intended this result. The second issue discussed in this section involves the relationship between Rule 251(c) and a new “substantial compliance” rule in Regulation A.<sup>137</sup> The rule and the SEC commentary hardly provide a clue as to the resolution of this issue. A single, simple comment from the SEC could have easily prevented either of these issues from arising. Once again, the SEC's unwillingness to acknowledge or explain what it was doing has led to unnecessary uncertainty.

### A. *Does the Integration Safe Harbor Preclude Integration with Sales in Violation of the Act?*

Rule 251(c) applies, without qualification, to all “prior offers or sales of securities” and to all “subsequent offers or sales of securities” that fall within one of the five specified categories.<sup>138</sup> But does the safe harbor apply if those prior or subsequent sales violated the registration provisions of the Act? For example, assume that an issuer engaged in an unregistered offering in violation of the Act, then subsequently undertook a Regulation A offering. The prior sales are already in violation, so integration would have little effect on them, but would Rule 251(c)(1) protect the Regulation A offering from integration? The rule itself appears absolute, applying to all prior offers or sales. But the Proposing Release described the safe harbor as protecting the Regulation A offering from integration “with any previously completed *registered or exempt* offering.”<sup>139</sup> In the example, the prior offering was neither registered nor

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<sup>136</sup> See *infra* Part VII.A.

<sup>137</sup> See *infra* Part VII.B.

<sup>138</sup> Rule 251(c)(1)–(2), 17 C.F.R. § 230.251(c)(1)–(2) (1993).

<sup>139</sup> Proposing Release, *supra* note 4, at 82,485 (emphasis added).

exempt; it was in violation of the Act. The language in the Proposing Release has led Harold Bloomenthal to suggest that the SEC's intent was to deny the safe harbor if the prior sales violated the Act.<sup>140</sup> He points out that this is consistent with former Rule 254(a)(1) in the pre-1992 Regulation A, which reduced the available aggregate offering price by the amount of any securities offered or sold in violation of the Act within a year prior to the Regulation A offering.<sup>141</sup> Bloomenthal's reading of the Proposing Release is perceptive. However, nothing in the rule itself expresses such an intent. Therefore, unless the SEC amends the rule or expresses its intention more clearly, the Rule 251(c) safe harbor is probably available even for prior offerings in violation of the registration provisions of the Act.

### B. *The Applicability of Regulation A's Substantial Compliance Rule*

The 1992 amendments to Regulation A added a "substantial compliance" rule almost identical to that in Regulation D. Rule 260<sup>142</sup> provides that a failure to comply with a term, condition, or requirement of Regulation A will not result in loss of the exemption as to a particular offer or sale if three conditions are met: (1) the requirement was not "directly intended to protect" the particular offeree, (2) the failure to comply was insignificant with respect to the offering as a whole;<sup>143</sup> and (3) a "good faith and reasonable attempt" was made to comply with the Regulation.<sup>144</sup> In effect, a good faith violation as to one offeree does not result in a violation of section 5 as to all offerees.

This substantial compliance rule has two possible applications in the integration context. First, if all of the requirements of Regulation A have been met, but another offer or sale poses an integration problem not covered by the Rule 251(c) safe harbor, can the substantial compliance rule be used to avoid

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<sup>140</sup> 3A BLOOMENTHAL, *supra* note 22, at 5-12. Both Bloomenthal's argument and the language in the Proposing Release are limited to Rule 251(c)(1) and *prior* sales in violation of the Act, but the issue could also arise with respect to subsequent sales under Rule 251(c)(2). For example, if sales in violation of the Act are made more than six months following the completion of the Regulation A offering, does Rule 251(c)(2)(v) apply? Or, if an employee benefit offering in violation of the Act is made following the Regulation A offering, does Rule 251(c)(2)(iii) apply?

<sup>141</sup> *Id.* This would be a basis for distinguishing subsequent offers and sales. See *supra* note 138. Only prior sales triggered the reduction in the available aggregate offering price.

<sup>142</sup> Rule 260(a)(1)-(3), 17 C.F.R. § 230.260(a)(1)-(3) (1993).

<sup>143</sup> Certain requirements—those in Rule 251(a), (b), (d)(1), and (d)(3)—are automatically deemed to be significant to the offering as a whole. Rule 261(a)(2), 17 C.F.R. § 230.261(a)(2) (1993).

<sup>144</sup> Rule 260(a)(1)-(3), 17 C.F.R. § 230.260(a)(1)-(3) (1993).

integration? Second, where all of the requirements of Regulation A have not been met, but there is substantial compliance with Regulation A, is the Rule 251(c) safe harbor still available to protect against integration?

1. *Can the Substantial Compliance Rule Cure an Integration Problem When Rule 251(c) is Unavailable?*

To examine the first problem, reconsider one of the hypotheticals considered earlier.<sup>145</sup> An issuer completes a Regulation A offering on January 1, makes a single sale of the same security on April 1, then begins a section 4(2) private offering of the same security on July 15. As explained earlier,<sup>146</sup> if, under the five-factor test, the April 1 offering would be integrated with the other two, the Regulation A exemption would be lost for the January 1 sales. But could Rule 260, the substantial compliance rule, be used to protect the Regulation A exemption in spite of the integration problem? Regulation A does not clearly answer this question, but the three conditions of Rule 260 might be met.

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January 1.....Regulation A sales

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April 1.....Single sale (same class)

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July 15.....Section 4(2) private offering

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The single April 1 sale is isolated, so if the issuer inadvertently and unknowingly stumbled into the integration problem, a claim of good faith is plausible. If so, one of the requirements of the substantial compliance rule is met. It is also arguable that the integration problem created by a single, isolated sale, such as the April 1 sale in the example, is insignificant to the offering as a whole. Unlike sections (a), (b), (d)(1), and (d)(3) of Rule 251, section (c) is not automatically deemed significant to the offering as a whole. If, however, the isolated sale, when integrated, would cause the integrated offering to exceed

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<sup>145</sup> See *supra* text accompanying notes 108–11.

<sup>146</sup> See *supra* text accompanying notes 108–11.



Regulation A's aggregate offering price limitations, the problem sale would be deemed significant to the offering as a whole,<sup>147</sup> and the substantial compliance rule would clearly not be available. The final requirement of the substantial compliance rule—that the violation of the integration doctrine does not pertain to a requirement intended to protect any purchasers other than the purchaser in the isolated sale—is more of a problem. On the one hand, the violation arises only from the isolated sale; in the absence of that sale, none of the other investors would be in any better position. This is similar to a failure to deliver the Regulation A offering circular to a single investor, and the SEC has indicated that the substantial compliance rule would be available for such a violation.<sup>148</sup> On the other hand, the integration doctrine is intended to protect *all* of the investors in a single offering, by requiring registration for the entire offering when the integrated offering does not meet the requirements of any exemption. In that sense, the integration doctrine is not designed to protect only the single purchaser whose purchase destroys the exemption. Given the uncertainty in applying this final requirement, it is unclear whether the substantial compliance rule could be used to protect against integration when Rule 251(c) is not available.<sup>149</sup>

## *2. The Availability of the Rule 251(c) Integration Safe Harbor When There is Not Full Compliance With Regulation A*

The substantial compliance rule raises a second issue—is an offering not in full compliance with Regulation A protected by the integration safe harbor? Rule 251(c) protects from integration offers and sales “made in reliance on this Regulation A.”<sup>150</sup> If an offering fully complies with Regulation A, the integration safe harbor clearly is available. But what if the offering does not meet all of Regulation A's requirements, but is protected by the substantial

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<sup>147</sup> Rule 261(a)(2), 17 C.F.R. § 230.261(a)(2) (1993).

<sup>148</sup> Adopting Release, *supra* note 6, at 62,169.

<sup>149</sup> Even if the three requirements of the substantial compliance rule are met, a broader issue remains—whether the Rule 251(c) integration safe harbor is even a “term, condition or requirement” for which Rule 251(c) excuses noncompliance. Rule 251(c) is not really a condition or requirement of Regulation A. A valid Regulation A offering can exist even though it does not fall within Rule 251(c). Offers that fall outside the integration safe harbor can still be valid Regulation A offerings as long as the traditional five-factor test does not require integration. Rather than imposing a condition or requirement, Rule 251(c) merely excuses issuers from an externally imposed integration requirement. *See* Rule 251(c), 17 C.F.R. § 230.251(c) (1993). Rule 251(c) could be considered a “term” of Regulation A, however, so Rule 260 could apply, if the three conditions are met.

<sup>150</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

compliance rule? Does Rule 251(c) still protect that offering from integration with other offerings? Or is an offering "in reliance on this Regulation A" only when there is full compliance with Regulation A? The answer is unclear, but language in the newly amended Regulation A should cause issuers concern.

Rule 260(a), the substantial compliance rule, does not preserve all of the benefits of Regulation A for an offering that only substantially complies with the exemption; it merely says that the exemption from section 5 for those offers and sales will not be lost. The failure to comply is "nonetheless . . . actionable by the Commission under section 20 of the Act."<sup>151</sup> Furthermore, the SEC may still suspend the Regulation A exemption because of the noncompliance.<sup>152</sup>

Nothing in either the Proposing or Adopting Releases discusses whether an offering not in full compliance with Regulation A but protected by Rule 260 is entitled to the Rule 251(c) integration safe harbor.<sup>153</sup> However, troublesome language in Regulation A itself might deny the integration safe harbor to such an offering. Recall that the Rule 251(c) safe harbor is available only for offers and sales "made in reliance on this Regulation A."<sup>154</sup> Rule 260(b), the subsection which preserves the SEC's right to proceed against an offering in substantial compliance, contains similar language. It begins with the following sentence: "*A transaction made in reliance upon Regulation A* shall comply with all applicable terms, conditions and requirements of the regulation."<sup>155</sup> This sentence could be viewed as a definition of the phrase "in reliance on . . . Regulation A" appearing in Rule 251(c).<sup>156</sup> A transaction in reliance on Regulation A, the only type of transaction for which Rule 251(c) is expressly available, is one which fully complies with Regulation A's requirements. An offering only in substantial compliance with Regulation A is not "in reliance on Regulation A," so the integration safe harbor is not available. Under this reading, the integration safe harbor would be available only for offerings that *fully* comply with Regulation A; substantial compliance would not be enough.

The availability of Rule 251(c) might be unimportant to the Regulation A

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<sup>151</sup> Rule 260(b), 17 C.F.R. § 230.260(b) (1993).

<sup>152</sup> Rule 260(c), 17 C.F.R. § 230.260(c) (1993).

<sup>153</sup> Nor is there anything in the releases proposing or adopting Regulation D's similar substantial compliance rule that would offer any guidance on this issue. *See* Securities Act Release No. 6825, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,404 (Mar. 14, 1989); Securities Act Release No. 6759, [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,222 (Mar. 3, 1988); Securities Act Release No. 6812, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,346 (Dec. 20, 1988).

<sup>154</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

<sup>155</sup> Rule 260(b), 17 C.F.R. § 230.260(b) (1993) (emphasis added).

<sup>156</sup> Rule 251(c), 17 C.F.R. § 230.251(c) (1993).

offering itself because Rule 260(a) will protect the section 5 exemption of the offers or sales substantially complying with Regulation A, whether or not they might otherwise be integrated. However, Rule 260(a) only protects the Regulation A offers and sales. It does not protect the offers and sales *outside of* Regulation A that Rule 251(c)'s two-sided safe harbor would have protected against integration. If the Rule 251(c) safe harbor is not available in the absence of full compliance with Regulation A, the Regulation A sales could be integrated into those other sales, destroying the exemptions of the other sales. In other words, in the absence of Rule 251(c) protection, the best that Rule 260(a) can do is to preserve only a one-sided safe harbor, protecting the Regulation A sales but not any other sales.

### VIII. CONCLUSION

Rule 251(c) appears to be a sensible contraction of the integration doctrine, but it could have been much better. It is, in part, a victim of the SEC's unwillingness to explain what the Commission is doing and why. The SEC has, unfortunately, continued its regrettable practice of substantially revising the integration doctrine in rule revisions and even no-action letters without explanation or discussion. The Commission staff began this process in the late 1980s with a series of no-action letters drastically expanding the applicability of Rule 152.<sup>157</sup> The Commission itself continued in 1990 with an extraordinarily broad but almost completely unexplained integration safe harbor for Rule 144A transactions.<sup>158</sup> The recent addition of Rule 251(c) continues that process of unexplained and unsupported contractions of the integration doctrine.

This retreat shows that the SEC has been sensitive to criticisms of the integration doctrine's breadth and uncertainty.<sup>159</sup> The changes adopted are generally positive and responsive to some of those criticisms. But the SEC's failure to explain or justify provisions like Rule 251(c) produces unnecessary ambiguity and uncertainty. As a result of the SEC's silence, Rule 251(c) has failed to reach its potential.

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<sup>157</sup> See Backman & Gervis, *supra* note 124, at 3; Johnson & Patterson, *supra* note 69.

<sup>158</sup> See Bradford, *supra* note 74.

<sup>159</sup> See *supra* text accompanying notes 56-68.

